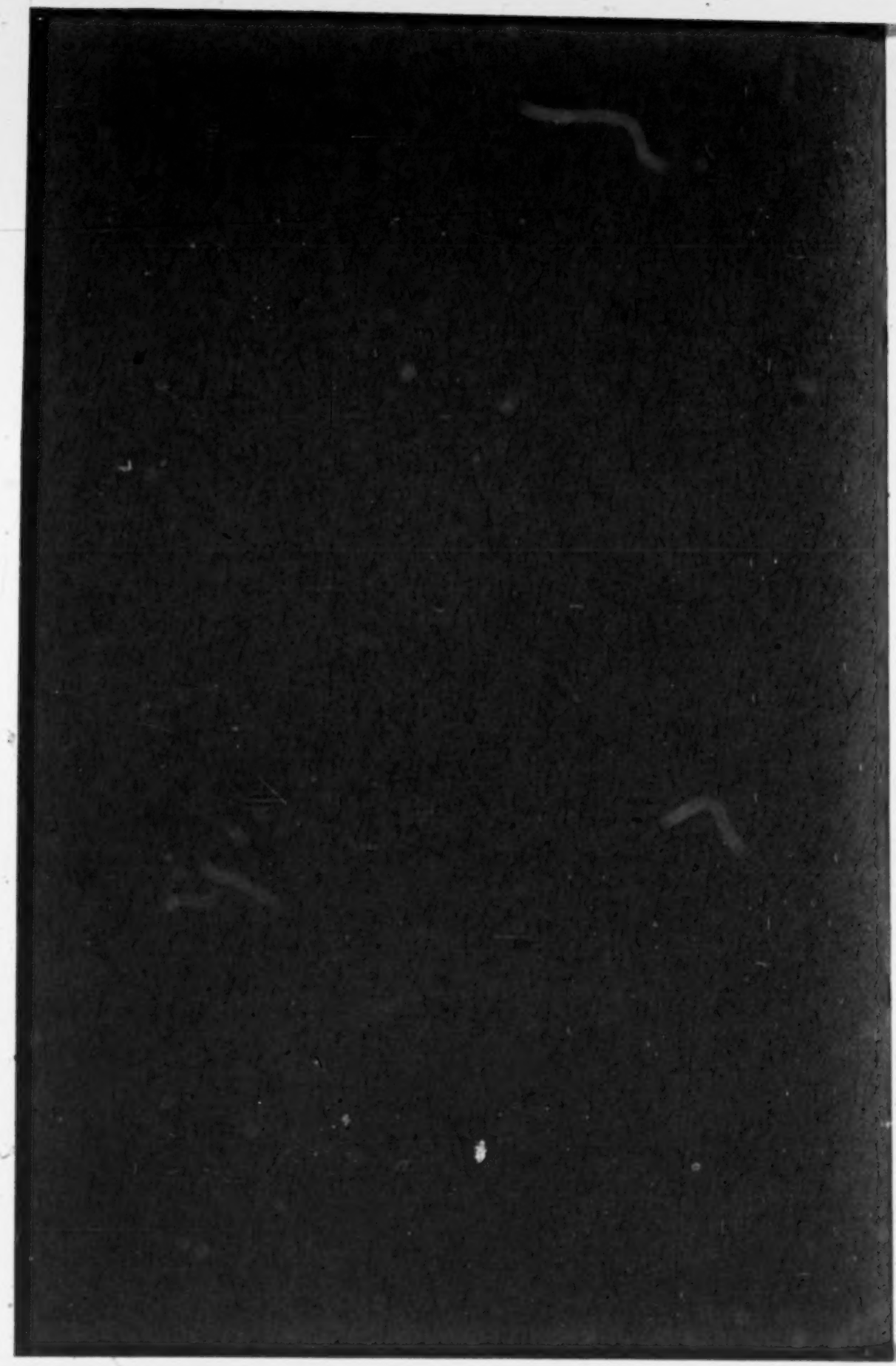

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. IX) is not yet reported. The opinion of the district court (Pet. App. I-VIII) is reported at 291 F. Supp. 874.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1969. A petition for rehearing was denied on November 18, 1969. The petition for a

writ of certiorari was filed on December 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 1407 of having failed, upon leaving the country, to register as a person convicted of a marihuana offense.

STATEMENT

Petitioner, a United States citizen, was convicted after a non-jury trial in the United States District Court for the Eastern District of Louisiana of departing the United States without registering as a person who had been convicted of a marihuana offense, in violation of 18 U.S.C. 1407.[1] He was sentenced to one year's imprisonment pursuant to 18 U.S.C. 4208(a)(2), *i.e.*, with eligibility for parole at such time as the Board of Parole sees fit (R. 254). The court of appeals affirmed.

The evidence showed that on December 28, 1965, petitioner departed New Orleans by commercial aircraft for Yucatan, Mexico. He returned on the same airline to New Orleans on January 1, 1966 (R. 67-69, 92-97). At the airport petitioner passed through

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[1] Petitioner was also convicted on two counts charging failure to register and return a certificate upon reentry, but, prior to sentencing, and after this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, the district court vacated these convictions on the ground that registration on reentry would have required petitioner to incriminate himself.

an area containing conspicuous signs which described the registration requirements under 18 U.S.C. 1407 to international passengers (R. 113-115). In January 1965 petitioner, with sale and possession of marihuana cigarettes, had pleaded guilty in a Louisiana state court to attempted possession of marihuana, and had received a suspended sentence of seven and a half years (R. 130). Petitioner did not register as one who had been convicted of a marihuana offense either when he left or upon his return to this country (R. 120-121). On his return, when questioned by a customs agent, petitioner said he had no narcotics convictions in his background (R. 122-123).

Petitioner testified on his own behalf that he was unaware of the registration requirement of 18 U.S.C. 1407 (R. 156). He denied having seen the signs posted at the airport (R. 173). He testified that he had permission to travel in the continental United States, that he assumed it was "all right to go to Mexico," and that soon after his return he reported the trip to his probation officer (R. 157-158). The probation officer confirmed the fact that petitioner had permission to travel and had reported on the trip to Mexico (R. 134-137).

ARGUMENT

1. 18 U.S.C. 1407 requires, *inter alia*, registration with customs officials upon departure from the United States by one who has been convicted of a "violation of any of the narcotic or marihuana laws of

* * * any State," the penalty for which is imprisonment for more than a year. Petitioner argues that his Louisiana conviction does not fit that definition because he was convicted under the general Louisiana attempt statute (La. Rev. Stat. 14:27), which makes attempt to commit a crime an offense punishable by half the penalty for the completed crime. His contention is fully answered by the opinion of the district court (Pet. App. VI-VII; 291 F. Supp. 874, 878-879). As the court pointed out, "without the crime of possession of narcotics there could be no crime of attempted possession of narcotics." Petitioner argues that the Louisiana attempt statute is so broad that it could be applied to situations of minimal complicity. Whether or not this is so, it would not alter the fact that the conviction would be for a violation of the laws relating to marihuana. That is all that is required to trigger the applicability of 18 U.S.C. 1407.

2. Registration upon leaving the country would in no respect have compelled petitioner to incriminate himself. Nothing in the registration as such was incriminating, for petitioner's Louisiana conviction was a matter of public record. Nor was the fact that petitioner was on his way to Mexico incriminating. Indeed, the requirement for registration upon departure as applied to one who has been convicted of a certain type of offense has consistently been upheld by the courts. *E.g.*, *Allen* v. *Meier*, 374 F. 2d 447 (C.A. 9), certiorari denied, 390 U.S. 972; see *Good* v. *United States*, 410 F. 2d 1217 (C.A. 5), pending on petition

for a writ of certiorari, No. 1019 Misc., this Term.[2]

Petitioner attempts to spell out a danger of incrimination by claiming that registration would have revealed a violation of probation. This was not, however, a real and substantial hazard. Petitioner had permission to travel. He himself testified that he therefore assumed it would be all right to go to Mexico—an assumption which proved correct since he reported the trip to his probation officer with no adverse results.[3]

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[2] In *United States* v. *Mancuso*, No. 358 (C.A. 2), decided January 20, 1970, the court of appeals thought that knowledge of or reasonable probability of knowledge of 18 U.S.C. 1407 was necessary for conviction. There the trial court specifically found that Mancuso, who had been convicted 17 years earlier of violating the narcotics laws, had no knowledge of the statute, and the court of appeals found that there was no reason to infer knowledge from the testimony as to signs at Kennedy airport. In the instant case, where petitioner's prior conviction of a narcotics offense preceded his failure to register by less than a year, the trial court did not consider that actual knowledge of or the reasonable probability of knowledge was a necessary element of proof in finding a violation of 18 U.S.C. 1407. There was, however, evidence in the record of the reasonable probability of knowledge, through conspicious signs posted at the airport. Thus *Mancuso*, even if correctly decided, is not in direct conflict with the decision here. In any event, the question probably has little significance for the future since the Controlled Dangerous Substances Act of 1969, as passed the Senate (see Daily Congressional Record, Vol. 116, No. 9, January 28, 1970, S § 815), would repeal 18 U.S.C. 1407.

[3] Petitioner's further suggestion (Pet. 10) that the courts below improperly "salvaged" that part of 18 U.S.C. 1407 relating to registration upon departure, as distinguished from reentry, is not well-founded. Contrary to petitioner's assertion,

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1970.

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none of Section 1407 has been invalidated as unconstitutional. Rather, as in the *Marchetti-Grosso* situation, the privilege against self-incrimination might be thought to provide a defense to criminal prosecution for violation of the requirement of registration upon reentry. That hardly means that the statute, in part or in whole, has been invalidated on constitutional grounds. And even had the statute been partially invalidated, Congress has provided that the usual separability clause should apply. Act of July 18 ,1956, P.L. 728, Sec. 402, 70 Stat. 567, 576.

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